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Book Review. The Professionalization of the English County Courts

Morris S. Arnold
Indiana University School of Law - Bloomington

BOOK REVIEW

THE PROFESSIONALIZATION OF THE ENGLISH COUNTY COURTS

THE COUNTY COURTS OF MEDIEVAL ENGLAND. By Robert C. Palmer.[1] Princeton, New Jersey: Princeton University Press. 1982. Pp. xvii, 360. $35.00.

Reviewed by Morris S. Arnold[2]

Legal historians have generally neglected the county courts of medieval England. Our work in the medieval English records has concentrated on the king's central courts, the courts that created the common law. When we do think of the county courts, it is in almost nostalgic terms — as the providers of a kind of shade-tree justice in a folkmoot attended by a stout, lesser gentry of the shire engaged in amiably settling disputes among neighbors.

Dr. Robert C. Palmer, in a remarkable book, has provided us a more sober evaluation of these local institutions. The courts that he describes bear no resemblance to the unprofessional tribunals that the received view has asked us to accept. Instead, the institutions that Palmer very carefully and convincingly documents are thoroughly professionalized. Palmer argues, moreover, that from the mid-twelfth to the mid-fourteenth century the county courts played a central role as intermediaries between the seignorial courts and the king's courts. Through the interchange of personnel and procedure, the feudal courts, the county courts, and the king's courts came by the thirteenth century to operate as a unified legal system (pp. xiii, 297). Thus, Palmer contends, the history of the county courts is of central importance to the legal and constitutional history of medieval England (p. xi).

Both the intermediary role and the professional nature of the county courts are illustrated by the sheriff, who presided but did not give judgment (pp. 28, 32). The sheriff, both a local official and a royal agent, was an important mediating figure: "instruction and persuasion by a prestigious royal agent, knowledgeable in the law and occupying an office of real local power, was vital to the rapid implementation of judicial in-

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[1] Visiting Assistant Professor of History and Lecturer of Law, University of Michigan.

[2] Ben J. Altheimer Distinguished Professor of Law, University of Arkansas at Little Rock.

novations and the avoidance of legal chaos" (p. 31). To fulfill his duties in the lower courts as well as to serve as the county executive officer of the king's court, the sheriff required an elaborate staff. Typically, a sheriff's staff included an undersheriff, a chief clerk, a few subordinate clerks, a bailiff itinerant, and a number of other subbailiffs (pp. 41–55). Though the size of this staff naturally varied from county to county, a substantial bureaucracy was in most places available as a matter of course to support the sheriffs in their work (pp. 54–55).

The location of the power to pronounce judgment also reflected the unifying function and professionalization of the county courts. Suitors, persons obligated to attend court by virtue of their tenure, were in theory empowered to give judgments. Because "the obligation of suit was tenurial and not based on professional qualifications, the position of the suitors as the judges of the lower courts has made the county and hundred courts seem irrevocably amateur to the historian" (p. 56). Palmer upsets this traditional view by demonstrating that in fact the county courts were dominated by the seneschals (stewards) of the great men of the county (pp. 119–20, 129). The seneschals, who also presided in the courts of their lords, customarily pronounced the judgments of the county courts (p. 129). In many ways, they also functioned as professional lawyers (p. 72). Palmer shows that the seneschals acted as pleaders in the county courts as well as attorneys in the central courts; they thus were instrumental in creating a unified legal system — a common law — by virtue of their familiarity with the law and procedure of the king's highest tribunals (pp. 89–90).

Palmer also shows that during the twelfth and thirteenth centuries innovative procedural devices promoted the integration of the very large number and variety of English courts into a cohesive legal system (p. 141). Probably the strongest centripetal force was the desire to provide unbiased hearings for litigants who would otherwise find their interests sacrificed to local prejudices (p. 141). The governing assumption was that higher courts could be trusted to render more impartial justice (p. 141). As a result, procedural techniques evolved to allow the transfer of certain cases from the feudal courts to the county courts and from the county courts to the king's courts. The process of tolt, the antiquity of which is perhaps evidenced by the Anglo-Saxon origin of the word, was available to remove a case from a feudal court to the county court; later, litigants could, under certain circumstances, obtain a writ of *pone* to remove the case to the central courts (pp. 145–

47). A writ of false judgment, returnable to the central courts, became available in the twelfth century to correct errors in the county courts (pp. 151–53). Thus, tolt and the writ of false judgment simultaneously reinforced the preeminence of county courts and subordinated them to the standards and practice of the king's courts.

The development of the *recordari* and the viscontiel writs provided the final procedural underpinnings of an integrated legal system. In the thirteenth century, the *recordari* became available to remove even plaints, cases not initiated by writ, from the county courts to the royal courts (p. 169). The twelfth and thirteenth centuries saw the creation of the viscontiel writs, writs directed to the sheriff and aimed at initiating litigation in the county courts, as well as the expansion of the kinds of wrongs remediable by these writs (pp. 174–80). "As the number of viscontiel writs grew during the thirteenth century, they initiated a larger share of any county's litigation and increased the communality of the law practiced in county courts" (p. 297). Thus, the various procedural devices for removal and initiation helped to create an integrated system of courts applying a common body of law.

In examining the nature and origin of the viscontiel writs, Palmer makes a number of iconoclastic assertions, all carefully documented and supported. The viscontiel writs, in Palmer's view, require explanation because "[t]he county courts . . . were supposed to be omnicompetent, barring those matters that involved the lord-tenant relationship and those matters that increasingly the king specially mandated to the central courts exclusively" (pp. 174–75). One needs to wonder, therefore, why litigants expended money and effort to obtain a writ to initiate actions that would already be within the jurisdiction of the county courts. An explanation sometimes advanced is that at least some viscontiel writs required the sheriff to act as judge in the cases they initiated (pp. 189–90). Palmer dissects the medieval legal texts that are commonly accepted as support for this view, and shows that they have probably been misinterpreted (pp. 189–92). In any case, the practice very clearly was otherwise: even in cases initiated by viscontiel writs, sheriffs merely acted as presiding officers and not as judges (pp. 192–98).

Palmer demonstrates that the probable motive for the invention of the viscontiel writs was the desire of plaintiffs to obtain in the county courts the benefits of certain common law rules. For instance, a plaintiff who sought to recover on an instrument might initiate his suit by a viscontiel writ and thus take advantage of the common law rule that a specialty — an

instrument in writing — had to be answered directly. A defendant confronted with this sort of foundation to the plaintiff's cause of action could not simply plead the general issue and have the case tried by compurgation. Instead, he was required to deny the instrument, and in time this issue came to be tried by jury (pp. 198–218).[3] Thus, the viscontiel writs effectively made the county courts act as courts of the common law (pp. 218–19).

The County Courts of Medieval England is a book that no one thought could be written, because it was believed that the necessary information was simply not available. One of the most striking characteristics of Palmer's work is that it is almost entirely archaeological. The book provides a painstaking reconstruction of a legal system long since buried. More precisely, Palmer's portrayal of the county courts provides a detailed description of a truly remarkable administrative achievement that was accomplished at a time when communication was, to say the least, extremely difficult. Because constitutional law consists mainly in locating administrative authority, the book also necessarily contains much interesting matter touching on the medieval English constitution. It would be correct to call Palmer's achievement traditional legal history, without in any sense meaning to be pejorative.

The book nevertheless tantalizes the reader through the subjects it omits. Palmer does not explicitly address the relationship between procedural developments and underlying legal norms. Although he emphasizes that the central theme of the history of the medieval county courts is "curial integration" (p. 297) — the degree to which the various courts in England were bound together into a legal system — it is a real question whether medieval English courts were even capable of producing a legal system that generated its own substantive rules. Commonly shared assumptions about what was required of a moral person, and not the demands of an external sovereign, were what mostly counted for substantive law in medieval England. Thus, one wonders if the decisional rules were any different before the procedural developments described by Palmer, or if instead the same cultural norms that the doomsmen applied in the tenth century folkmoots continued in the jury

[3] In the course of making this argument, Palmer shows that the county courts in fact originated the common law rule that an action of covenant could be based only on a written instrument. The viscontiel writ of covenant had from the first required that the plaintiff show a sealed document in order to maintain his action. Palmer's suggestion that the rule "trickled up" from the county courts to the common law (pp. 199–217) stands the usual view more or less on its head.

verdicts of the fourteenth century county courts. It is more than a little remarkable that *The County Courts of Medieval England* almost never refers to substantive legal rules.

Palmer's book serves not only to remind us of the important role of the county courts in medieval England, but also to disabuse us of naive or superficial attitudes toward the history and evolution of law. *The County Courts of Medieval England* intrudes upon the frame of mind that rejects everything old as low and dull, and the book refutes the conceit that progress in the law is a modern phenomenon. Holmes did us no favor when he suggested that, in understanding the law, "a page of history is worth a volume of logic,"[4] for he thereby reinforced the notion that history is illogical. The high middle ages have still not been entirely liberated from the bogey of the "dark ages"; for most lawyers, the phrase "medieval history" is simply a combination of two synonyms for the irrational. A splendid piece of reconstruction like this book offers an antidote to such attitudes. In reminding us of the sophistication of a medieval legal system, *The County Courts of Medieval England* admirably promotes the goal of the study of history — to increase our wisdom about how the world works.

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[4] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).